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November 20, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 30, 2003

Case Number: TSO-0063

This Decision considers the eligibility of XXXXXXXX XXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, it is my decision that the individual's access authorization should not be restored at this time.

I. BACKGROUND

The individual is an employee of a Department of Energy (DOE) contractor. The individual possessed a DOE access authorization for several years, but this clearance was suspended pending the resolution of questions regarding the individual's eligibility for access authorization. DOE security personnel had conducted interviews with the individual in September 2001 (the 2001 PSI) and in January 2002 (the January 2002 PSI) and December 2002 (the December 2002 PSI). In addition, at the request of DOE security, the individual was evaluated in November 2001 by a DOE-consultant psychiatrist (hereafter "the DOE psychiatrist"), who issued a letter containing his findings and recommendations. The DOE psychiatrist reexamined the individual in January 2003. In June 2003, the Manager of the DOE area office where the individual is employed (the Manager) issued a Notification Letter to the individual. In this letter, the Manager states that the individual's behavior has raised security concerns under Sections 710.8(j) and (l) of the regulations governing eligibility for access to classified material. Specifically, with respect to Criterion (j), the Manager finds that the individual has been

diagnosed by the DOE psychiatrist as suffering from Alcohol Dependence without adequate evidence of rehabilitation or reformation. DOE Exhibit 5. In addition to the psychiatrist's findings, the Manager bases the DOE's Criterion (j) concerns on the individual's three alcohol related arrests: a 1988 arrest for being drunk in public and two arrests for Driving While Intoxicated (DWI) that occurred in April 1989 and in November 2002. The Manager also cites information provided by the individual indicating that the individual was hospitalized for alcohol treatment for 21 days in August-September 2001 and admissions by the individual of heavy and increasing alcohol consumption during the period 1994 through August 2001. DOE Exhibit 2.

With respect to Criterion (l), the Manager finds that information in the possession of the DOE indicates that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy. In this regard, the Manager refers to the individual's violation of a promise to the DOE to remain abstinent from alcohol. Following his January 2002 PSI, the individual signed an agreement with DOE Security to abstain from alcohol and to enter an alcohol monitoring program for two years. The Manager finds that the individual's November 2002 arrest for DWI violated this commitment.

The individual requested a hearing to respond to the concerns raised in the Notification Letter. In his response to the Notification Letter, the individual disputes portions of the Notification Letter's summary of his September 2002 PSI testimony and asserts that he is currently involved in a DOE alcohol monitoring program. However, he does not dispute the DOE psychiatrist's conclusion that he suffers from alcohol dependence. Accordingly, the hearing convened on this matter focused chiefly on the concerns raised by the individual's past pattern of alcohol consumption, and on the individual's efforts to mitigate those concerns through abstinence from alcohol and recovery activities. The hearing was convened in early October 2003, and testimony was received from eight persons. The DOE presented the testimony of a personnel security specialist and the DOE psychiatrist. The individual testified and presented the testimony of his wife, the psychologist who he sees through his Employee Assistance Program (the EAP psychologist), his immediate supervisor, his senior supervisor, and a friend/co-worker. 1/

1/ As indicated by the testimony of the DOE psychiatrist at the

II. **REGULATORY STANDARD**

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the Hearing Officer. As discussed below, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the Hearing Officer to base all findings relevant to this eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6) and 710.27(b), (c) and (d).

A. **The Individual's Burden of Proof**

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. The standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). **Personnel Security Review (Case No. VSA-0087)**, 26 DOE ¶ 83,001 (1996); **Personnel Security Hearing (Case No. VSO-0061)**, 25 DOE ¶ 82,791 (1996), *aff'd*, **Personnel Security Review (VSA-0061)**, 25 DOE ¶ 83,015 (1996). The individual therefore is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The regulations at Part 710 are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, by regulation and through our own case law, an individual is afforded the utmost latitude in the presentation of evidence which could mitigate security concerns.

1 / (...continued)

Hearing (TR at 38-39) and by the testimony of the EAP psychologist (TR at 60-62), both of these medical professionals have extensive clinical experience in diagnosing and treating alcohol related illnesses. They clearly qualified as expert medical witnesses in that area.

Nevertheless, the evidentiary burden for the individual is not an easy one to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. **See *Department of Navy v. Egan***, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); ***Dorfmont v. Brown***, 913 F.2d 1399, 1403 (9th Cir. 1990), ***cert. denied***, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to his own testimony, we generally expect the individual in these cases to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the Hearing Officer that restoring access authorization is clearly consistent with the national interest. ***Personnel Security Hearing (Case No. VSO-0002)***, 24 DOE ¶ 82,752 (1995); ***Personnel Security Hearing (Case No. VSO-0038)***, 25 DOE ¶ 82,769 (1995) (individual failed to meet his burden of coming forward with evidence to show that he was rehabilitated and reformed from alcohol dependence).

B. Basis for the Hearing Officer's Decision

In personnel security cases under Part 710, it is my role as the Hearing Officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

III. ANALYSIS

A. Criterion (j) Concerns

At the Hearing, the DOE psychiatrist testified that he examined and evaluated the individual for the DOE on three occasions - February 1993 (DOE Exhibit 20), in November 2001 (DOE Exhibit 16), and in January 2003 (DOE Exhibit 4). He stated that in his 1993 evaluation of the individual, he recognized that "he was clearly alcohol dependent" in the past, based on his history of drinking in high school, while in the navy, and his 1988 DWI. However, the individual's controlled drinking following the 1988 DWI convinced the DOE psychiatrist that "he had demonstrated an ability to control his drinking, which was adequate to my view." Hearing Transcript (TR) at 41. He therefore found in his 1993 evaluation that "there is no evidence of alcohol dependence or abuse at this time." DOE Exhibit 20 at p. 2.

Following the individual's 2001 hospitalization for alcohol treatment, the DOE psychiatrist reevaluated the individual and found that he met the criteria for Alcohol Dependence set forth in the "Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition" (DSM-IV). (DOE Exhibit 16). The DOE psychiatrist's reports and the testimony of the EAP psychologist clearly indicate that the individual was properly diagnosed as suffering from Alcohol Dependence. This diagnosis of Alcohol Dependence is not disputed by the individual or by the EAP psychologist. TR at 117, 62. The issue in this case is whether the individual has mitigated the security concerns arising from this diagnosis by demonstrating rehabilitation or reformation. Accordingly, I will proceed to consider the recommendations for treatment provided by the DOE Psychiatrist, the individual's efforts at rehabilitation following his August 2001 hospitalization, and his efforts at rehabilitation following his November 2002 relapse.

1. The Individual's Past Rehabilitation Efforts and the Current Recommendations for Treatment.

In his November 2001 Report, the DOE psychiatrist noted that the individual had recently completed in-patient treatment for alcoholism and had not used alcohol since that time. The Report described his post treatment rehabilitation program as follows:

He is currently going to [Alcoholics Anonymous] AA meetings on a three times per month basis. He has also stopped smoking and states he has changed his habits

significantly from what was normal for him in the past. He also states he has struggled with his sobriety but has remained abstinent of alcohol. [The individual] is aware that his current AA attendance may be less than what he should be doing and he feels he will increase the AA meetings if necessary. He is also going to what appears to be a monitoring program [with DOE Security administered by his EAP] and visits with [an EAP counselor] on a once per month basis. He also does random [urinalysis tests].

DOE Exhibit 16 at 1. Based on these recovery efforts and his participation in the monitoring program with DOE Security, the DOE psychiatrist concluded that the individual had demonstrated adequate evidence of rehabilitation. *Id.* at 2.

Following the individual's November 2002 DWI, the DOE psychiatrist re-examined the individual. The individual reported to him that he had become overconfident with his recovery about six months after his 2001 hospitalization. In about March 2002, the individual had stopped attending AA meetings and had begun to re-associate with drinking friends, eventually leading to a single drinking episode that resulted in the November 2002 DWI. DOE Exhibit 4 at 2. The DOE psychiatrist described the individual's rehabilitation effort after this DWI as follows:

One week after the arrest, he signed up for an outpatient program [2/]. . . , and has been clean and sober since November 16, 2002. He now attends [this] outpatient program 3 meetings per week and regular AA meetings as well. His intention is to remain clean and sober, and he feels that he has learned his lesson.

Id. Based on this recovery effort and on the condition that "he be followed in a monitoring program for a 2-year period," the DOE

2/ At the Hearing, the individual described a slightly different set of events. The individual testified that immediately after his November 2002 relapse, he made an appointment to see the EAP psychologist. Within a week after his appointment, he stated that he followed the EAP psychologist's advice and entered the outpatient treatment program. The individual testified that he entered this program in early December 2002. TR at 124. I find that this is not a significant discrepancy in the factual record.

psychiatrist found that the individual had demonstrated adequate evidence of rehabilitation. *Id.* at 3. However, after being informed by DOE Security that the individual no longer qualified for its monitoring program 3/ , the DOE psychiatrist issued a revised evaluation, finding that without the benefit of a monitoring program with DOE Security, the individual's rehabilitation "is not adequate." DOE Exhibit 3.

In his initial testimony at the Hearing, the DOE psychiatrist stated that in the absence of an agreement and monitoring program with DOE Security, the individual's rehabilitation is not adequate. TR at 55. He testified that two years of demonstrated abstinence was generally a "reasonable figure" for demonstrating rehabilitation from alcohol dependence.

Generally if one can get past two years -- and continue on with the recovery program after two years, they would have a very good chance of remaining abstinent for a significant period beyond that. But again there are all kinds of errors in that concept as well. Nothing is 100 percent.

TR at 56. He stated that for this individual, who had had a severe relapse in November 2002 after several months of treatment, "twenty four months [of demonstrated abstinence] would be an adequate picture of recovery, with the caveat that his recovery program must continue beyond that." TR at 93. He emphasized that the individual's time period of demonstrated abstinence should be measured from the time of the individual's November 2002 relapse, and should not include the individual's previous period of sobriety.

The relapse of 2002 does put [the individual] back to the starting gate again. And the reason it does that is because the recovery program that he had developed, which was satisfactory up until November [2002] or so, failed.

3/ At the Hearing, the DOE security specialist testified that the monitoring agreement that the individual entered into with DOE Security in 2001 ended when the individual relapsed in November 2002. Although the individual continues to be monitored for alcohol use through his EAP program, this monitoring program is not sanctioned by DOE security as a means of mitigating his diagnosis of alcohol dependence. TR at 33-35.

TR at 54. The EAP psychologist agreed with the time frames of this assessment. He testified that the individual "should complete two years of his current recovery program with adequate evidence before being reconsidered for [a security clearance]." He also stated that this two years should be measured from the time of the individual's November 2002 relapse. TR at 81.

2. The Individual's Abstinence and Treatment Decisions.

Clearly, a commitment to abstain from alcohol and to seek proper treatment are necessary requirements for any showing of rehabilitation by the individual from his diagnosis of Alcohol Dependence. As discussed below, I find that the individual has committed himself to a program aimed at supporting his ongoing sobriety. I also find that he has successfully demonstrated that he has refrained from consuming alcohol since his relapse on November 16, 2002.

At the hearing, the individual testified that since his November 16, 2002 DWI, he has abstained from alcohol. TR at 118. I find the individual's testimony in this regard to be credible. However, given the individual's pattern of alcohol dependence, his assertions alone are not a sufficient evidentiary basis for establishing that he is maintaining abstinence from alcohol. As I stated in telephone conversations with the individual and at the outset of the Hearing, the individual must provide a convincing amount of corroborative testimony or other evidence in order for me to accept his assertions that he has been abstaining from alcohol. TR at 8.

I find that the individual has supported his assertion of abstinence by a substantial amount of evidence. As an initial matter, he has established that shortly after his November 2002 DWI he began an intensive outpatient recovery program. He testified that in early December of 2002 he entered an outpatient treatment program that consisted of nine or ten weeks of intensive meetings and weekly meetings with a counselor through September 2003. TR at 123-124. He submitted a letter dated September 29, 2003 from his outpatient program counselor which confirms that he participated successfully in this program and will continue to see the counselor for monthly visits beginning in October 2003. Individual's Exhibit 2. She writes that

[The individual] has completed all required assignments in a timely and thorough manner. He participated well in the group milieu. [He] has at all times appeared clean

and sober, he denies any use of alcohol or other mood altering chemicals. He has had two urine drug tests that came back negative. He attends one Twelve Step meeting per week and reports putting effort into healthy life-style behaviors. . . . We consider [the individual] to be in full compliance with his treatment at this time.

Id. At the hearing, the individual clarified that the drug tests by the outpatient program occurred early in his treatment, but that he is still participating in random drug testing through the EAP. The EAP psychologist corroborated that the individual is currently in an alcohol monitoring program and that all of his random tests, which are administered on a monthly basis, have been negative. TR at 77. 4/ He also testified that he regularly meets with the individual to discuss recovery and related issues, and that he believes that the individual's relapse from alcohol abstinence in November 2002 was a one-time event. TR at 71. **See also** Letter of EAP Psychologist dated August 26, 2003 submitted as Individual's Exhibit 1.

The individual also testified that as a result of his November 2002 DWI, he is required by his state to have an ignition interlock on his car that requires him to perform a breathalyser test before operating his car. TR at 118. On September 25, 2003, he submitted copies of periodic reports concerning the ignition lock which indicate that it was installed on February 3, 2003 and that the individual's vehicle was operated through August 8, 2003 (the date of the most recent report submitted) with no alcohol use.

Finally, the individual called several witnesses to testify concerning his abstinence and recovery efforts. The most significant testimony is that of his wife. She testified that she first met the individual in March 2002 and that they lived together beginning in May 2002. From the time that she met him until she moved to another city in early September 2002, she testified that she did not see him use alcohol. TR at 83. She acknowledged that he contacted her on November 17, 2002 and told her that he had been

4/ The EAP psychologist testified that the EAP alcohol monitoring tests are always performed during the workday, and that it would be possible for someone to consume alcohol on the evenings and weekends without being detected. TR at 78. However, he noted that the test is sensitive, so that someone consuming significant amounts of alcohol until about 2 a.m. would have a positive test the next day. TR at 79.

arrested for DWI. TR at 84. She testified that she and the individual were in daily telephone contact while they lived apart and that she visited him for the Thanksgiving Holiday in 2002. She stated that in February 2003 she returned to the individual's city and has lived with him since then. TR at 86. She stated that during this entire period, with the exception of the November 16, 2002 DWI, she has never seen or suspected that he has used alcohol. She also testified that she does not consume alcohol and that there is no alcohol in their home. TR at 86. She testified that the individual has given up his former social friends to support his abstinence, and that she and the individual mostly spend time together. TR at 87.

The individual's friend/co-worker testified that he has known the individual for several years, and that since approximately December 2002 or January 2003 their desks have been right next to each other at the office. He stated that he has never smelled alcohol on the individual since they have worked together. He stated that he last saw the individual consume alcohol after playing golf several years ago. He states that he normally plays golf with the individual on Wednesdays and occasionally on weekends. He testified that he has not visited the individual in his home. TR at 114-116. The individual's supervisor and senior supervisor testified that they had observed nothing to indicate that the individual has failed to remain abstinent since November 2002. TR at 96-109.

Based on the individual's active participation in a recovery program and ongoing EAP counseling, the opinions of the EAP psychologist and outpatient program counselor, his monthly random alcohol tests at his workplace, his ignition interlock test results, and the testimony of his wife and co-worker, I find that the individual has provided sufficient corroborating evidence to support the position that he has not consumed alcohol since his DWI on November 16, 2002.

3. The Individual's Progress Toward Rehabilitation.

At the hearing, the DOE psychiatrist and the EAP psychologist were both present to hear the testimony of the individual concerning his rehabilitation efforts. As noted above, both of these medical professionals expressed the opinion that two years of documented abstinence and participation in an ongoing recovery program would be necessary to achieve rehabilitation from the individual's diagnosis of alcohol dependence.

At the Hearing, the individual provided evidence and testimony indicating that he is pursuing an active recovery program. As discussed above, the individual entered an intensive outpatient treatment program in early December 2002, shortly after his November 2002 DWI. The September 23, 2003 letter from his counselor in that program indicates that he completed it successfully and is continuing with monthly aftercare sessions. Her letter also indicates that he is attending AA meetings once a week. Individual's Exhibit 2. The individual testified that "I am an alcoholic, and right now I am in recovery, and I feel that I am doing the things that I need to do to maintain a sober, clean lifestyle." TR at 120. He testified that AA has become his support system and that he recently acquired an AA sponsor. TR at 121. Following the Hearing, he submitted an e-mail from his this sponsor acknowledging that he has agreed to sponsor the individual. E-mail dated October 7, 2003.

The EAP psychologist also testified concerning the individual's progress toward rehabilitation following his November 2002 DWI. He stated that he made a decision to allow the individual to continue in the EAP program

because I did perceive the reasons for his relapse, the fact that it was a one-time, a serious relapse, and that he was willing to come back to treatment again, and go at it again. And that's a common pattern for substance abusing people.

TR at 74. He testified that he has counseled the individual on a monthly basis, and that he recently diagnosed the individual as suffering from depression and referred him to a physician for medication.

[I]t's my hope that in addition to abstinence, continuing participation in [his] outpatient program, continuing participation in AA, and this additional treatment for this depression, psychiatric condition, that this will improve the likelihood that [the individual] will cope well and not relapse.

TR at 68. He also testified that he believes that the individual has developed a better understanding of his need to attend AA and work with a sponsor. TR at 70.

As discussed above, in his initial testimony at the Hearing, the DOE psychiatrist stated that in this case he believes that the

individual's rehabilitation period must be measured from the time of his November 2002 relapse, and that, in the absence of a monitoring program sanctioned by DOE Security, the individual had not yet shown rehabilitation. He indicated that two years of abstinence would demonstrate rehabilitation provided that the individual was committed to continuing his recovery program beyond that date. TR at 54-56, 93. At the close of the hearing, the DOE psychiatrist expressed some concern that certain anti-depressant medications could increase the risk of relapse, but otherwise he did not alter his earlier pronouncements. TR at 131. At the close of the Hearing, the EAP psychologist declined to revise his earlier testimony that the individual should complete two years of his current recovery program in order to be considered rehabilitated, and that this two years should be measured from the time of the individual's November 2002 relapse. TR at 81.

In the administrative review process, the Hearing Officer has the responsibility for making the determination as to whether an individual with alcohol and/or drug problems has exhibited rehabilitation or reformation. **See** 10 C.F.R. § 710.27. The DOE does not have a set policy on what constitutes rehabilitation from substance abuse, but instead makes a case-by-case determination based on the available evidence. Hearing Officers properly give a great deal of deference to the expert opinions of psychiatrists and other mental health professionals regarding rehabilitation or reformation. **See, e.g., Personnel Security Hearing (Case No. VSO-0027), 25 DOE ¶ 82,764 (1995) (finding of rehabilitation); Personnel Security Hearing (Case No. VSO-0015), 25 DOE ¶ 82,760 (1995) (finding of no rehabilitation).**

In the present case, while I believe that the individual clearly is committed to working with the DOE to resolve its security concerns, I am unable to find that there has been sufficient rehabilitation or reformation at this time to mitigate the security concerns raised by his diagnosis of alcohol dependence. At the time of the Hearing, the individual had only demonstrated eleven full months of abstinence from alcohol and participation in an effective rehabilitation program. He also has committed himself to continue in a monitored program of alcohol abstinence with his employer's EAP for as long as he works at the DOE site, and to continue in AA indefinitely. 5/ TR at 126, 127. Although the individual is

5/ In a November 10, 2003 letter to DOE Security, the EAP psychologist states that the individual has signed a

(continued...)

currently pursuing an active recovery program and has committed himself to continuing it, I find the concerns raised by the DOE psychiatrist and the EAP psychologist to be reasonable and persuasive. They both conclude that the individual's eleven months of abstinence are insufficient to lower the individual's risk of relapse to an acceptable level, and that two years of demonstrated abstinence are necessary to establish the individual's rehabilitation or reformation. Accordingly, I believe that it would not be appropriate to restore the individual's access authorization at this time.

B. Criterion (1) Concerns

With respect to Criterion (1), the Notification Letter finds that information in its possession indicates that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interests of the national security. In this regard, the Notification Letter refers to the individual's violation of a promise to the DOE to remain abstinent from alcohol. Following his January 2002 PSI, the individual signed an agreement with DOE Security to abstain from alcohol and to enter an alcohol monitoring program for two years. The Manager finds that the individual's November 2002 arrest for DWI violated this commitment.

The cited DWI arrest and violation of his security agreement are clearly the result of the individual's alcohol dependence, and are not the type of unusual behavior that is properly raised as an independent security concern. As discussed above, the individual is currently abstaining from alcohol and is actively pursuing a recovery program. However, he has not yet maintained his abstinence long enough to demonstrate rehabilitation from his diagnosis of alcohol dependence. I therefore find that the Notification Letter's Criterion (1) concerns are part of the Criterion (j) concern of alcohol dependence which the individual has not yet mitigated. If the DOE eventually were to resolve the Criterion (j) security concern in the individual's favor, it would be appropriate to reinstate the individual's access authorization.

5/ (...continued)

commitment to continue alcohol monitoring with random urine tests and counseling sessions on a quarterly basis for the duration of his employment at the DOE site.

IV. *CONCLUSION*

For the reasons set forth above, I find that the individual suffers from alcohol dependence subject to Criterion (j). Further, I find that this derogatory information under Criterion (j) has not been mitigated by sufficient evidence of rehabilitation or reformation at this time. Accordingly, after considering all the relevant information, favorable or unfavorable, in a comprehensive and common-sense manner, I conclude that the individual has not yet demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. It therefore is my conclusion that the individual's access authorization should not be restored. The individual may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: November 20, 2003